

JA-95-42

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:)
Request of A.C. Nielsen Co.) DA 89-1060
for Permissive Use of Line)
22 of the Active Portion of)
the Television Video Signal)

MOTION TO WITHDRAW PERMISSIVE AUTHORITY

VidCode Inc. ("VidCode"), by its attorneys, hereby moves the Commission to withdraw the special temporary permissive authority granted to A.C. Nielsen Company ("Nielsen") to encode line 22 of the active portion of the television video signal. As is more fully discussed below, Nielsen has violated the terms of that temporary authority, the grant of which was unnecessary to meet Nielsen's claimed purposes and is prejudicial to the fair usage of Line 22 by currently authorized users. For the same reasons, Nielsen's request for permanent authority should also be denied.

BACKGROUND

By letter dated November 22, 1989, the Commission staff, acting pursuant to delegated authority, granted Nielsen special temporary authority to encode Line 22 of the

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active video signal subject to specified exceptions and limitations.

Among the limitations imposed by the Commission on Nielsen's line 22 operation was the requirement that Nielsen encode only "broadcast material" actually being monitored by Nielsen. Moreover, the Commission concluded that Nielsen's monitoring of commercials would not qualify as a legitimate use of the active video line. Lastly, the Commission expressly reserved the authority to withdraw Nielsen's temporary authority at its discretion.¹

DISCUSSION

A. Nielsen's AMOL Signals Have Been Encoded
Commercials On Line 22, Violating the STA

As is demonstrated by the attached affidavit of Christopher D. Pearce, Nielsen's AMOL signals have been encoded on commercials using Line 22. The evidence of this encoding is substantial.

As more fully discussed below, this encoding of commercials on Line 22 violates the exceptions and requirements imposed by the Commission on Nielsen's line 22 operations. Moreover, the inclusion of Nielsen's AMOL signals on line 22 actions adversely affects Vidcode's

1. By letter dated May 1, 1990, Nielsen's authority has been extended indefinitely subject to all of the exceptions and limitations imposed by the November 22, 1989 letter.

ability to market its services in competition with Nielsen.²

Thus, the existence of the conditions established by the Commission for the summary withdrawal of Nielsen's STA to encode on Line 22 have been demonstrated. Vidcode respectfully moves the Commission to act in accordance with its reserved discretion and terminate Nielsen's STA.

B. The Commission Properly Excluded Nielsen from Encoding Line 22 of Commercial Advertisements

At the core of this proceeding is the simple fact that Nielsen's proposed operation on Line 22 would necessarily interfere with previously authorized line 22 uses. Nielsen proposes to use line 22 to encode commercials and commercial breaks at the time of encoding program materials. This, in effect, will preclude any other commercially viable use of Line 22 by other authorized users. And unlike other authorized users (and persons who will seek access to Line 22 in the future), Nielsen has

2. As Nielsen has asserted, see Nielsen Reply Comments filed October 3, 1989, at 19 n. 20, the potential customers of a service such as Vidcode's or Nielsen's require a high level of reliability (according to Nielsen at the 95 percent level). If those customers perceive that Nielsen can interfere with VidCode's line 22 signal whenever it desires and without legal or practical restraint, VidCode will be disabled from marketing this service. And VidCode has no other available facility to offer this service, since Nielsen already controls the only other VBI line available for this purpose. Thus, the grant of Nielsen's request would provide Nielsen with the ammunition to destroy VidCode, while the denial of the request will not allow VidCode to destroy Nielsen.

effective control of the other TV signal line which could be used viably for SID encoding/decoding purposes.

Thus, no matter how Nielsen may attempt to characterize its request as comparable to other requests already granted by the Commission, it is inherently dissimilar. The previous requests have added competitors (and therefore competition) to the market for broadcast verification services. By contrast, if Nielsen's request is granted, Nielsen would obtain complete control over the facility necessary for providing this service, i.e., access to either line 20 or 22. In other words, the grant of the Nielsen request would have placed in the hands of Nielsen the ability to destroy competition.

For these reasons, the Commission concluded in the November 22, 1989 letter that, in the public interest, Nielsen would not be authorized to use line 22 to encode commercials.³ The Commission staff was fully justified and correct in specifying that "The AMOL signal shall not be

3. This is fully consistent with the policy underlying the authorization of special signal access to the VBI and Line 22, which is expressly premised on the Commission's ability to preclude one such user from obtaining competitive advantage over another authorized user. See, 18 RR 2d at 1791. Moreover, the Commission has pledged, as a matter of policy, that "should it develop, in practical effect, that others are effectively precluded from taking advantage of the facility made possible by this rule, we will take such steps as then appear appropriate in light of the situation." Id., at ¶ 63.

embedded in commercials" This absolute prohibition was distinguished from the limitations imposed on encoding program materials: the November 22, 1989 letter allows Nielsen to integrate the AMOL signal "with program material being monitored by Nielsen," but not in "other broadcast materials which are not being monitored by Nielsen." To make certain that Nielsen knew the exact parameters of the temporary authority it was receiving, the Commission explicitly ordered Nielsen to ensure "that its AMOL encoding of line 22 is wholly confined to the program material it legitimately seeks to track and does not adversely affect Airtrax's or others authorized use of that line for other legitimate purposes." (emphasis added).⁴

Notwithstanding these clear and explicit directives, Nielsen's AMOL signals have been encoded on commercials on Line 22, and this is adversely affecting VidCode. Thus, VidCode submits, the conditions established by the Commission for the summary withdrawal of Nielsen's STA to encode on Line 22 have been demonstrated.

4. The distinction between programming materials and commercial advertisements could not have been missed by Nielsen since this distinction derives from Nielsen's own terminology. See, Nielsen's July 19, 1989 Request for Permanent Authority, at p. 1, which distinguishes between for encoding "advertising and/or program identification signals."

C. Nielsen Has No Need To Encode Line 22

Moreover, evidence submitted by Vidcode (including the tape submitted with the attached affidavit) fully corroborates the arguments presented by Airtrax and Vidcode throughout this proceeding -- namely, that Nielsen's purported justifications for requesting authority to encode Line 22 are concocted out of whole cloth.

Nielsen had previously claimed that it was unable to arrange for acceptable levels of broadcast of syndicated programming encoded on Line 20 because the recording equipment in some undetermined number of local broadcast stations "involuntarily strip" Line 20. This claim was an essential element of Nielsen submission because, in accordance with Commission policy, the VBI and Line 22 are available for encoded transmission "only when a licensee is unable to transmit the signals by other means which have no detrimental effect on the broadcast service." See, Letter of November 22, 1989 at 1 (citing 22 FCC 2d 779 (1970)).

1. Nielsen Has The Technical Ability to Transmit Line 20 AMOL Signals On Syndicated Programs

The tape submitted with the attached affidavit demonstrates, however, that Nielsen can transmit AMOL codes on syndicated programming equally well on both lines 20 and 22. The transmission quality is equivalent (and high) on both lines. Nielsen has also demonstrated the ability to

transmit high quality non-stripped syndicated encoding solely on Line 20 without simultaneous broadcast on Line 22. Nielsen clearly has the technical ability to perform all intended functions without using Line 22.

2. Line 20 Reencoders Are Available If Needed

Further, as VidCode has demonstrated, there is available to Nielsen low cost equipment which will allow a local broadcast licensee to reencode line 20 with AMOL signals should they be stripped out. See, Catalogue of Valley Stream Group Ltd., submitted by Vidcode to the Commission during a meeting on April 26, 1990.⁵ Assuming that the stripping problem exists at all (which Nielsen has utterly failed to demonstrate through any reliable, credible evidence), Nielsen has long had the ability to overcome the problem without ever seeking additional authority to use line 22, simply by placing these relatively low cost encoders in local stations.⁶ Nielsen has long arranged for

5. Nielsen has referred to Valley Stream for their expert opinion in this proceeding, see Nielsen's Reply Comments filed October 3, 1989, Exhibit B, and as a reputable supplier of AMOL encoding equipment.

6. Vidcode is informed that the cost of placing this equipment in the "stripping" stations would be minimal, in the range of \$3200 to \$4200. See, Affidavit of Christopher Pearce. Although Nielsen has never provided the Commission with an estimate of the number of local stations which strip line 20 involuntarily and which Nielsen regularly monitors (Nielsen does not monitor all stations on a regular weekly
(continued...))

the placement of its AMOL decoding equipment at the facilities of local broadcasting licensees as part of its "in-house" program and claims to have received substantial cooperation from the licensees in this regard. Its apparent failure to even attempt to place encoders is inexplicable unless connected to its assertion of the right to predate on its competitors now using line 22.⁷

6. (...continued)
basis), it seems unlikely that Nielsen would have to place these encoders in more than 20 to 50 stations to meet their needs. This represents a cost of less than \$100,000, a small fraction of the costs incurred by Vidcode in developing its Line 22 encoding/ decoding technology (now exceeding \$1.5 million).

That use of this equipment would require the cooperation of the local stations is not pertinent. Nielsen has admitted that even those local stations which chose to strip all AMOL signals from line 20 have extensively cooperated with Nielsen's "in-station" verification system. There is no reason to believe that reencoding through use of this type of equipment or other equipment put in place by Nielsen would not solve the "involuntary stripping" problem hypothesized by Nielsen.

7. In light of its anticompetitive purpose and effect, Nielsen's request is directly inconsistent with existing Commission policy. See, note 2 above. Having already obtained competitive advantage over Vidcode by its exclusive access to Line 20, Nielsen now seeks to preclude Vidcode from line 22. The denial of Nielsen's request is, therefore, fully consistent with the Commission's pledge and policy that, "should it develop, in practical effect, that others are effectively precluded from taking advantage of the facility made possible by this rule, we will take such steps as then appear appropriate in light of the situation." Id., at ¶ 63.

3. Syndicators Can Arrange for Broadcast of AMOL Without the Grant of Nielsen's Request

Finally, Nielsen's oft-repeated claim that its access to Line 22 is essential to serve the needs of syndicators⁸ is utterly ludicrous. If Nielsen's syndicator/clients truly desire AMOL information, this is already completely within their control. They could, for example, include a stipulation in their contracts with the local stations requiring that, if and when the stations broadcast the syndicated program, it include the broadcast of AMOL codes transmitted on line 20.⁹ In this manner, Nielsen's oft-invoked "marketplace" would truly be allowed to determine the value of transmitting AMOL codes on syndicated shows.

CONCLUSION

8. See, e.g., Nielsen's Reply Comments filed October 3, 1989, at 15-16:

As to the syndicators, it is at their request, not Nielsen's, that Nielsen is seeking authority to transmit SID codes on Line 22 because those transmissions are needed to provide more reliable ratings to the syndicated programming industry.

(emphasis in original).

9. Indeed, Nielsen has effectively admitted this in previous filings with the Commission. See, Nielsen's "Reply to Opposition to Request" filed August 21, 1989, at 17 n. 18.

Nielsen has apparently violated the express terms of its special temporary authority to encode syndicated programming on line 22. Moreover, the record now demonstrates that Nielsen can achieve all of its asserted purposes using line 20. Therefore, pursuant to the Commission's reserved discretion, Nielsen's temporary authority to use line 22 should be summarily withdrawn and its request for permanent authority should be denied.

Respectfully submitted,

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David E. Hilliard, Esquire

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CITY OF WASHINGTON)
: SS:
DISTRICT OF COLUMBIA)

AFFIDAVIT OF CHRISTOPHER D. PEARCE

CHRISTOPHER D. PEARCE, being duly sworn, deposes
and says:

1. I am a software engineer for VidCode, Inc., located at 255 Bear Hill Road, Waltham, Massachusetts. I have been employed by VidCode for approximately 8 months. Previously, I was employed as a software engineer by a manufacturer of computerized video editing equipment for approximately 5 years. In 1984, I received a bachelor of science degree in computer science from the University of York, in the United Kingdom.

2. On or before April 24, 1990, I was viewing a program on Channel 38 in Boston, Massachusetts, at 3 o'clock P.M. In order to verify the uses of the Vertical Blanking

Interval, I manipulated the picture so that I could view the VBI, and observed what appeared to be AMOL encoding on Lines 20 and 22. I reported this observation to others at VidCode who asked me to continue to monitor this particular program on Channel 38 for these purposes. On April 25, I again observed what appeared to be AMOL signals on both Lines 20 and 22, and saw these signals encoded on commercial signals as well as program materials. On April 26, I was recording the program on a video cassette recorder when this occurred again (and in particular with respect to encoding on the second and third commercial breaks). Submitted herewith is the original recording of that signal.

3. At the request of VidCode's attorneys, I made copies of the original recording and viewed them on a digital storage oscilloscope. I was able to capture representations of the encoded signals for both Lines 20 and 22. Using the AMOL signal specifications (which I understand had been obtained by VidCode through filings made by A.C. Nielsen Co. in the above-entitled matter), I was then able to determine that the signals matched the specifications of AMOL and that the signals on Line 20 and Line 22 were identical or near-identical. I was then able to extract information from the signals using ASCII and binary codes. This extracted information indicated that the

encoded program was syndicated by a company identified by the letters "WARBR". (I noted that, at the end of the program, the distribution company is identified as Warner Bros.) The program was identified as "CVC" and was dated April 12 (no year associated with this information). This was true for the information encoded on both lines 20 and 22, and for both the programming materials and the encoded commercial materials.

4. At the request of VidCode's attorneys, on May 10, 1990, I called Valley Stream Group, Ltd. at the telephone number indicated on their catalogue for "SID-Generator Reader M-SGR-38). I asked for the price charged for one such reader, and was quoted \$4200. I asked whether quantity discounts might be available, and was told that a discount of between 10 and 15 percent was negotiable for quantities above 10 units.

C. D. Pearce

Christopher D. Pearce

Sworn to and subscribed before
me this 10th day of May, 1990.

Chiquita R. Vane

Notary Public

My Commission Expires January 31, 1992